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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-659

JUDITH ANITA PHILLIPS, widow of
David Emanuel Phillips, deceased,
Petitioner,

versus

DEKALB COUNTY, GEORGIA,
Respondent,

UNITED STATES OF AMERICA,
Respondent, Third-Party Plaintiff,

versus

MACHINERY BUYERS CORP., and
SOUTHEAST MACHINERY, INC.,
Respondent, Third-Party Defendants.

BRIEF OF PETITIONER JUDITH ANITA PHILLIPS

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BRIEF OF PETITIONER JUDITH ANITA PHILLIPS

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Fifth Circuit, entered after rehearing, is reported at 538 F.2d 643, and was reprinted in its entirety in Appendix A to the Petition for a Writ of Certiorari filed by Petitioner herein. The original panel

decision of the United States Court of Appeals for the Fifth Circuit is reported at 526 F.2d 679, and was reprinted in its entirety as Appendix B to the Petition for a Writ of Certiorari by Petitioner herein. The opinion of the United States District Court for the Northern District of Georgia, dated September 25, 1974, which is not reported, was reproduced in its entirety as Appendix C of the Petition for a Writ of Certiorari of Petitioner herein. The original opinion of the United States District Court for the Northern District of Georgia, dated June 27, 1974, which is not reported, is reprinted in its entirety as Appendix D to the Petition for a Writ of Certiorari by Petitioner herein.

JURISDICTION

The original judgment of the United States Court of Appeals was entered on January 30, 1976. Respondent filed a petition for rehearing in said Court, resulting in the original judgment of said appellate tribunal being modified by judgment entered on August 25, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

The following Acts and statutes are relevant to the questions presented by this Petition:

49 U.S.C. §1508(a)

"Declaration of national sovereignty in airspace; operations of foreign aircraft

(a) The United States of America is declared to possess and exercise complete and exclusive national

sovereignty in the airspace of the United States, including the airspace above all inland water and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. . . ."

(Pub.L. 85-726, Title XI, §1108, Aug. 23, 1958, 72 Stat. 798.)

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49 U.S.C. §1716

"Project applications for airport development

Submission

(a) Subject to the provisions of subsection (b) of this section, any public agency, or two or more public agencies acting jointly, may submit to the Secretary a project application, in a form and containing such information, as the Secretary may prescribe, setting forth the airport development proposed to be undertaken. No project application shall propose airport development other than that included in the then current revision of the national airport system plan formulated by the Secretary under this subchapter, and all proposed development shall be in accordance with standards established by the Secretary, including standards for site location, airport layout, grading, drainage, seeding, paving, lighting, and safety of approaches.

Public agencies subject to State law

(b) Nothing in this subchapter shall authorize the submission of a project application by any municipality or other public agency which is subject to the law of any State if the submission of the project application by the

municipality or other public agency is prohibited by the law of that State.

Approval

(c)(1) All airport development projects shall be subject to the approval of the Secretary, which approval may be given only if he is satisfied that—

(A) the project is reasonably consistent with plans (existing at the time of approval of the project) of planning agencies for the development of the area in which the airport is located and will contribute to the accomplishment of the purposes of this subchapter;

(B) sufficient funds are available for that portion of the project costs which are not to be paid by the United States under this subchapter;

(C) the project will be completed without undue delay;

(D) the public agency or public agencies which submitted the project application have legal authority to engage in the airport development as proposed; and

(E) all project sponsorship requirements prescribed by or under the authority of this subchapter have been or will be met.

No airport development project may be approved by the Secretary with respect to any airport unless a public agency or the United States or an agency thereof holds good title, satisfactory to the Secretary, to the landing area of the airport or the site therefor, or gives assurance satisfactory to the Secretary that good title will be acquired.

(2) No airport development project may be approved by the Secretary which does not include provision for

the installation of the landing aids specified in subsection (d) of section 1717 of this title and determined by him to be required for the safe and efficient use of the airport by aircraft taking into account the category of the airport and the type and volume of traffic utilizing the airport.

(3) No airport development project may be approved by the Secretary unless he is satisfied that fair consideration has been given to the interest of communities in or near which the project may be located.

(4) It is declared to be national policy that airport development projects authorized pursuant to this subchapter shall provide for the protection and enhancement of the natural resources and the quality of environment of the Nation. In implementing this policy, the Secretary shall consult with the Secretaries of the Interior and Health, Education, and Welfare with regard to the effect that any project involving airport location, a major runway extension, or runway location may have on natural resources including, but not limited to, fish and wildlife, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment, and shall authorize no such project found to have adverse effect unless the Secretary shall render a finding, in writing, following a full and complete review, which shall be a matter of public record, that no feasible and prudent alternative exists and that all possible steps have been taken to minimize such adverse effect. . . ."

(Pub.L. 91-258, Title I, §16, May 21, 1970, 84 Stat. 226; 1970 Reort. Plan No. 2, eff. July 1, 1970, 35 F.R. 7959, 84 Stat. 2085; Pub.L. 93-44, §4, June 18, 1973, 87 Stat. 89.)

49 U.S.C. §1718.

"Project sponsorship requirements; compliance; contracts between Secretary and public agencies; air traffic control activities; relief of sponsors

As a condition precedent to his approval of an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him, that—

Public use

(1) the airport to which the project for airport development relates will be available for public use on fair and reasonable terms and without unjust discrimination;

Maintenance and operation

(2) the airport and all facilities thereon or connected therewith will be suitably operated and maintained, with due regard to climatic and flood conditions;

Airport hazards

(3) the aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or cration of future airport hazards;

Compatible use of adjacent land

(4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft;

Government use; charge

(5) all of the facilities of the airport developed with Federal financial assistance and all those usable for landing and takeoff of aircraft will be available to the United States for use by Government aircraft in common with other aircraft at all times without charge, except, if the use by Government aircraft is substantial, a charge may be made for a reasonable share, proportional to such use, of the cost of operating and maintaining the facilities used;

Air traffic control activities

(6) the airport operator or owner will furnish without cost to the Federal Government for use in connection with any air traffic control activities, or weather-reporting and communication activities related to air traffic control, any areas of land or water, or estate therein, or rights in buildings of the sponsor as the Secretary considers necessary or desirable for construction at Federal expense of space or facilities for such purposes;

Accounting

(7) all project accounts and records will be kept in accordance with a standard system of accounting prescribed by the Secretary after consultation with appropriate public agencies;

Self-sustaining fee and rental structure

(8) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport, taking into account such factors as the volume of traffic and economy of collection;

Reports

(9) the airport operator or owner will submit to the Secretary such annual or special airport financial and operations reports as the Secretary may reasonably request; and

Inspection of records

(10) the airport and all airport records will be available for inspection by any duly authorized agent of the Secretary upon reasonable request.

To insure compliance with this section, the Secretary shall prescribe such project sponsorship requirements, consistent with the terms of this subchapter, as he considers necessary. Among other steps to insure such compliance the Secretary is authorized to enter into contracts with public agencies, on behalf of the United States. Whenever the Secretary obtains from a sponsor any area of land or water, or estate therein, or rights in buildings of the sponsor and constructs space or facilities thereon at Federal expense, he is authorized to relieve the sponsor from any contractual obligation entered into under this subchapter or the Federal Airport Act to provide free space in airport buildings to the Federal Government to the extent he finds that space no longer required for the purposes set forth in paragraph (6) of this section."

(Pub.L. 91-258, Title I, §18, May 21, 1970, 84 Stat. 229.)

Georgia Code Annotated, §11-201

"Municipalities, etc., may acquire airports

Municipalities, counties, and other political subdivisions are hereby authorized, separately or jointly, to

acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate and police airports and landing fields for the use of aircraft, either within or without the geographical limits of such municipalities, counties, and other political subdivisions, and may use for such purpose or purposes any available property that is now or may at any time hereafter be owned or controlled by such municipalities, counties, or political subdivisions. All counties in the State of Georgia which are located on the boundary line between the State of Georgia and any other State, as well as all municipalities and other political subdivisions which are located in such boundary counties, are hereby authorized, separately, jointly with each other or jointly with any county, municipality or political subdivision of any such border State, to acquire, establish, construct, expand, own, lease, control, equip, improve, maintain, operate, regulate and police airports and landing-fields for the use of aircraft, either within or without the geographical limits of such border counties and the municipalities and other political subdivisions therein contained in the State of Georgia or within the geographical limits of any county, municipality or political subdivision of any such border State other than the State of Georgia."

(Acts 1933, p. 102; 1941, p. 380.)

Georgia Code Annotated, §11-405

"Airport Zoning; things to be considered in adopting or revising

In adopting or revising any such zoning regulations, the political subdivision shall consider, among other

things, the character of the flying operations expected to be conducted at the airport, the nature of the terrain, the height of existing structures and trees above the level of the airport, the possibility of lowering or removing existing obstructions, and the views of the agency of the Federal Government charged with the fostering of civil aeronautics, as to the aerial approaches necessary to safe flying operations at the airport."

(Acts 1946, pp. 121, 123.)

Georgia Code Annotated, §3-108

"Parties to actions on contracts

As a general rule, the action on a contract, whether express or implied, or whether by parol or under seal, or of record, shall be brought in the name of the party in whom the legal interest in such contract is vested, and against the party who made it in person or by agent. The beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on said contract."

(Acts 1949, p. 455.)

QUESTIONS PRESENTED

1. Does the Federal Airport and Airway Development Act, 49 U.S.C. §1711, et seq., provide a remedy to survivors of deceased passengers aboard an aircraft which crashed because of a county's violation of the provisions thereof?

(a) Is the field of air commerce so thoroughly regulated by the Federal Government as to preempt States from placing limitations on liability for violation of federal aviation statutes?

(b) Does said statute permit an implied Federal civil remedy against parties found to be in violation thereof?

2. Is the continued recognition of the doctrine of sovereign immunity as a defense to county liability upon the facts of the present litigation an arbitrary and irrational distinction in violation of the Equal Protection Clause of the United States Constitution?

3. Does Petitioner have standing to sue DeKalb County, Georgia, as a beneficiary of the numerous Grant Agreements between the United States of America and DeKalb County, Georgia?

STATEMENT OF THE CASE

This action is before the Court to review the dismissal of Petitioner's complaint for failure to state a claim upon which relief can be granted. Consequently, a review of the facts as are contained in said complaint, as well as those facts known to exist, would be appropriate in the evaluation of the propriety of the subject dismissal.

As stated in said complaint (A.107), on February 26, 1973, at approximately 10:12 a.m., a learjet Model 24 aircraft took off from Runway 20L at DeKalb-Peachtree Airport in Atlanta, Georgia. Immediately after becoming airborne, the turbine or jet engines of said aircraft ingested a large number of birds, which resulted in the loss of the necessary engine thrust and the eventual crash of said aircraft, killing all passengers aboard, including Petitioner's husband, David Emanuel Phillips.

DeKalb-Peachtree Airport is located in DeKalb

County, Georgia, on land transferred to said County by the General Services Administration of the United States of America on or about February, 1960. On said airport property and land deeded to DeKalb County, Georgia, by the United States of America, there was commenced in 1962 a garbage dump. Said garbage dump was closed from 1964 through 1966, when it was reopened, and has been continuously utilized as such through and including the time of the crash here involved.

For several years prior to February 26, 1973, DeKalb County, Georgia, and the United States of America discussed, corresponded, met, and argued over the closing of said garbage dump and the attraction of said garbage dump to thousands of migratory birds.

Nevertheless, since 1960, DeKalb County was the recipient of six separate Federal Grant Agreements with the United States pursuant to the Federal Airport and Airway Development Act of 1970, 49 U.S.C. §1711, et seq., and such Act's predecessor, the Federal Airport Act, 49 U.S.C. §1110, et seq. In fact, the particular runway used by the Learjet aircraft here involved was constructed with monies received by DeKalb County pursuant to said Grant Agreements.

By said Grant Agreements, DeKalb County obligated itself to perform certain duties with regard to the use thereof, as well as land lying in the immediate vicinity of said airport. As taken from said contracts with the United States, there appears, *inter alia*, the following:

> "1. These covenants shall become effective upon acceptance by the Sponsor of an offer of Federal

aid for the Project or any portion thereof made by the FAA, and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and effect throughout the useful life of the facilities developed under this Project, but in any event not to exceed twenty (20) years from the date of said acceptance of an offer of Federal aid for the Project.

2. *The Sponsor will operate the Airport as such for the use and benefit of the public.* . . . That Sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the Airport if such action is necessary for the *safe operation* of the Airport or necessary *to serve the civil aviation needs of the public.* . . .

6. The Sponsor will operate and maintain in a *safe* and serviceable condition the Airport and all facilities thereon and connected therewith which are necessary to serve the *aeronautical users* of the Airport other than facilities owned or controlled by the United States, and *will not permit any activity thereon which would interfere with its use for Airport purposes:* . . .

11. The Sponsor will not enter into any transaction which would operate to deprive it of any of the rights and powers necessary to perform any or all of the covenants herein made. . . .

12. The Sponsor will keep up to date at all times an airport layout plan of the Airport showing . . . Such airport layout plan, and each amendment, revision, or modification thereof, shall be subject to the approval of the FAA, which approval shall be evidenced by the signature of a duly authorized representative of the FAA on the face of the original layout plan. The Sponsor will not make or permit the making of any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so

approved by the FAA, if such changes or alterations might affect the *safety*, utility, or efficiency of the Airport.

13. Insofar as it is within its power and to the extent reasonable, the *Sponsor will take action to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft.*" (A.26)

Each of the above assurances, covenants, promises, and contractual obligations has been violated by the activities of DeKalb County, as well as others not herein specified.

Subsequent to the crash of the Learjet aircraft and the death of Petitioner's decedent, the United States of America instituted an action in the United States District Court for the Northern District of Georgia, whereby it sought and obtained injunctive relief as to the operation of jet aircraft into and out of the DeKalb-Peachtree Airport. Judith Anita Phillips, widow of David Emanuel Phillips, deceased, instituted the present action for the wrongful death of her decedent, against DeKalb County, Georgia, and the United States of America, pursuant to diversity jurisdiction, 28 U.S.C. §1332, and the Federal Tort Claims Act, 28 U.S.C. §1346(b), respectively. The complaint as filed sought recovery against said Defendants upon the basis of negligence, nuisance, and as a third-party beneficiary to the contractual agreements between said Defendants. Respondent DeKalb County, Georgia, moved the District Court to dismiss Petitioner's Complaint as failing to state a claim upon which relief can be granted (A.125), which motion was granted by the District Court on June 27, 1974. See Appendix D

to the Petition for a Writ of Certiorari of Petitioner herein. The motion for reconsideration and to set aside said order and judgment was denied by the District Court by order dated September 24, 1974. See Appendix C to the Petition for a Writ of Certiorari of Petitioner herein. Appeal was taken to the United States Court of Appeals for the Fifth Circuit, which Court on January 30, 1976, affirmed the District Court as to its dismissal of Petitioner's Complaint upon the bases of negligence and nuisance, but reversed the District Court and held Petitioner to be a third-party beneficiary of the subject Grant Agreements. See Appendix B to the Petition for a Writ of Certiorari of Petitioner herein. Respondent, DeKalb County, Georgia, moved the Court for rehearing and rehearing en banc, and said petition was granted, resulting in the Court of Appeals' affirming the District Court holding in all respects by order and judgment entered August 25, 1976. See Appendix A to the Petition for a Writ of Certiorari of Petitioner herein.

SUMMARY OF ARGUMENT

Petitioner contends that the Federal Airport and Airway Development Act of 1970, 49 U.S.C. §1711, et seq., was a lawful and legitimate exercise of Congress' commerce power, which Act is but a part of the overall extensive, pervasive, and exclusive exercise of such authority with regard to interstate air commerce. The Commerce Clause permits, and the Federal statutes and regulations authorize, States and counties to participate in the receipt of federal monies and funds, but upon voluntarily accepting the benefits of said federal program, a county cannot circumscribe its liability and bar responsibility upon the basis of

sovereign immunity. Consequently, the Federal Government has preempted any limitations on liability when an otherwise immune governmental agency avails itself of the benefits of acting in a proprietary capacity.

In addition, the holding of this Court in *Cort v. Ash*, 422 U.S. 66 (1975), and its progeny *Rausch v. United Instruments, Inc.*, 405 F.Supp. 435 (E.D. Pa.), *on rehearing*, 405 F.Supp. 442 (1975), clearly hold that an implied federal civil remedy exists with regard to the particular Act in question. Said remedy is available to effectuate the purposes of said Act, which primarily is to promote air safety. Accordingly, Petitioner possesses not only a right but a remedy which cannot be defeated by the assertion of sovereign immunity as a defense.

Further, the majority of the States of the United States have concluded that no rational justification exists for the continued recognition of governmental immunity, at least as to those proprietary activities in which local governments now engage. This Court now has ruled that statutes which are arbitrary in nature; which create a classification without reason and rationality; and are incapable of achieving a desired objective, constitute a violation of the Equal Protection Clause of the United States Constitution. Applying both principles to the case at bar, then Respondent should not be able to avail itself of said defense as a bar to liability.

Lastly, Petitioner contends that irrespective of whether state law or federal common law is utilized to determine Petitioner's rights as a third-party beneficiary to Grant Agreements made between the United States and DeKalb County, Georgia, she has stated a

claim upon which relief can be granted. Under the law of the State of Georgia, a private individual has a right to sue a county upon a contract which it is authorized to make for wrongful death damages sustained and incurred. Similarly, under several federal court decisions, the particular Aviation Statute and Grant Agreements here involved were construed and found to impose liability upon a breaching party, which liability ran to injured and deceased third-party beneficiaries of said Agreements.

For all of the above reasons, Petitioner contends that she has stated a claim upon which relief can be granted, and that the trial and appellate Courts erred in their ultimate conclusions with regard to the same.

ARGUMENT AND CITATION OF AUTHORITIES

PART I

1. DOES THE FEDERAL AIRPORT AND AIRWAY DEVELOPMENT ACT OF 1970, 49 U.S.C. §1711, ET. SEQ., PROVIDE A REMEDY TO SURVIVORS OF DECEASED PASSENGERS ABOARD AN AIRCRAFT WHICH CRASHED BECAUSE OF A COUNTY'S VIOLATION OF THE PROVISIONS THEREOF?

(a) IS THE FIELD OF AIR COMMERCE SO THOROUGHLY REGULATED BY THE FEDERAL GOVERNMENT AS TO PREEMPT STATES FROM PLACING LIMITATIONS ON LIABILITY FOR VIOLATION OF FEDERAL AVIATION STATUTES?

While this Court has on numerous occasions considered the pervasive effect of the regulatory network pertaining to aviation and aeronautical commerce,

the present litigation presents the unanswered question of whether a county participating as a private individual in air commerce can circumscribe its liability for tortious misconduct. Petitioner avers that DeKalb County, Georgia, has voluntarily elected to participate in such business activity when it assumed the responsibility for the operation and financial success of DeKalb-Peachtree Airport, and by so doing, waived any claim of sovereign immunity resulting from its negligent activities with regard to the same.

At the outset, it is understood and acknowledged by all parties hereto, including Respondent DeKalb County, Georgia, that DeKalb-Peachtree Airport is, in fact, being operated in a proprietary or business capacity. Such interest in said airport was further recognized by the Courts of the State of Georgia, where, in *Southern Airways Company v. DeKalb County*, 102 Ga. App. 850, *cert. denied*, 118 S.E. 2d 234 (1960), the Georgia Appellate Court specifically held that Respondent was engaged in a business or proprietary function when it operated the particular airport here in question. Consequently, no issue exists as to whether Respondent was acting as a private individual or corporation, with a profit motive, as to the particular airport here involved.

As to the issue presently under consideration, the Court will note that Congress has specifically announced its legislative intent when in 49 U.S.C. §1508(a), it stated,

> "The United States of America is declared to possess and exercise complete *and exclusive national sovereignty* in the airspace of the United States, including the airspace above all inland waters and

> the airspace above those portions of the adjacent marginal high seas, bays, and lakes over which by international law or treaty or convention the United States exercises national jurisdiction." (Emphasis added.)

Said expression of intent was recognized by this Court in *Braniff Airways v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954), when it was held that federal acts and regulations governing air commerce are certainly bottomed upon the commerce power of the United States Congress, and as such, may extend to their logical limit. Pursuant to said authorization, the Federal legislature has authorized the United States District Courts to enter and adjudicate all controversies with regard to commerce without regard to jurisdictional amount or diversity of citizenship. *See*, 28 U.S.C. §1337.

The position herein under consideration is whether the congressional recognition of its right and supremacy as to interstate commerce, and in particular with regard to aviation, permits a State, and its political subdivision, to limit its responsibility for violations of federal aviation statutes and thus place a burden upon interstate commerce. In answer to this inquiry, this Court held, in *Parden v. Terminal Railway of Alabama State Docks Department*, 377 U.S. 184 (1964), that a State forfeited a portion of its sovereignty and waived its immunity for all acts done within the realm of congressional legislation and regulation. As such, said State acted as a private person or corporation, and was thus subject to regulation and suit. *Id.* at 196.

Since this Court's holding in *Parden*, numerous Courts of Appeal have reached similar conclusions as

to varying governmental enactments within the purview of the commerce clause. In *Pennsylvania Environmental Council, Inc. v. Bartlett*, 454 F.2d 613 (3rd Cir. 1971), the Court found that a state highway department was not immune from suit, and had waived a portion of its sovereign immunity. Similarly, in *Chesapeake Bay Bridge and Tunnel District v. Lauritzen*, 404 F.2d 1001 (4th Cir. 1968), the Court concluded that the State of Virginia had relinquished its immunity in a suit by a ship owner, while the Court in *Briggs v. Sagers*, 424 F.2d 130 (10th Cir.), *cert. denied*, 400 U.S. 829 (1970), found that the State of Utah waived immunity from liability under the Fair Labor Standards Act because of the regulatory power of Congress under the Commerce Clause to the United States Constitution.

While the foregoing authorities recognize the limits of Congressional authority over interstate commerce, in areas where State regulation is frequently concurrent with the exercise of Federal regulation, the field of aviation is almost exclusively dominated and controlled by the Federal Government. This Court, through Justice Jackson, recognized that fact in *Northwest Airlines v. Minnesota*, 322 U.S. 292 (1944), when it held as follows:

> "Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel, and under an intricate system of federal commands. The moment a ship taxies onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the

> control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone, and not to any state government." *Id.* at 303.

A more recent and similar holding to that just quoted can be found in this Court's decision of *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973). Consequently, DeKalb County, Georgia, has not merely entered into the area of regulating work conditions of employees within this State or establishing criteria for the construction of highways within this State, where federal and state regulations are nearly coextensive, but has entered into the realm of federal aviation, and interstate commerce connected therewith, wherein federal regulation is overriding, compelling, and exclusive. No clearer example could exist of federal preemption. As such, all State concepts of limited liability must yield, and DeKalb County must be placed in equal footing with other private individuals who fall within the purview and scope of the aviation statutes of this country.

In recognition of this concept, the Court in *Rohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975), refused to apply the Indiana rule and applied the federal principle of contribution and indemnity as to a mid-air crash over said State. The Court in *Rohr* recognized federal preemption over aviation and further found that result to be mandated by virtue of the fact that the United States was a party to said suit pursuant to the Federal Tort Claims Act. Likewise, in the present litigation, the United States is a party pursuant to said statute. The Courts in

In Re Paris Air Crash of March 3, 1974, 399 F.Supp. 732 (C.D. Calif. 1975); and *Gabel v. Hughes Air Corp.*, 350 F.Supp. 612 (C.D. Calif. 1972), concluded that the Federal Government has preempted the field of aviation and thoroughly controlled all aspects with regard to the same. Consequently, a violation of a duty owed to the Administrator of the Federal Aviation Administration under any of the Acts imposing responsibilities on private individuals created a right of action in the one who is injured or damaged by reason of such violation.

What then remains is to question the answer of the Court below to this particular inquiry. The Court will note that in the per curiam decision of the en banc Court, reference was made to this Court's holding in *United States v. Orleans*, 425 U.S. 807 (1976), as being dispositive of Petitioner's right of recovery. However, the lower Court's reliance on said holding is misplaced. In said decision, this Court had occasion to consider the responsibility of the Federal Government pursuant to the Federal Tort Claims Act for acts of a community action agency, because said agency received Federal grants, contracts, etc. Consequently, the United States was directly sued upon an agency or respondeat superior theory of liability. This Court found that inasmuch as the United States did not engage or control the day-to-day operations of said agency, it could not be held responsible for any actions by such entity. Clearly, the facts and holding of this Court in *Orleans* are in no way applicable to the present litigation.

Instead, this Court must determine whether DeKalb County, Georgia, entering into the operation of an airport for the purpose of making a profit, may operate

said airport in violation of the Federal Aviation Statutes of this country and escape liability to persons injured or damaged as a result thereof. In light of the aforesaid holdings, the inescapable conclusion is that a State and its political subdivision waive sovereign immunity to the extent that they act as a private individual in the area of aeronautical interstate commerce. Under the facts of the present litigation, DeKalb County, Georgia, should thus be held responsible for its clear violation of the Federal Airport and Airway Development Act of 1970, 49 U.S.C. §1711, et seq., and such Act's predecessor, the Federal Airport Act, 49 U.S.C. §1110, et seq.

(b) DOES SAID STATUTE PERMIT AN IMPLIED FEDERAL CIVIL REMEDY AGAINST PARTIES FOUND TO BE IN VIOLATION THEREOF?

Closely associated with the right of Petitioner to sue DeKalb County, Georgia, because of the applicability of federal preemption in the field of aeronautical commerce, is the right of Petitioner to proceed under the Federal Airport and Airway Development Act of 1970 pursuant to an implied federal civil remedy.

In this regard, all cases which recently have had occasion to consider the propriety of fashioning a federal remedy from a particular legislative enactment refer to this Court's holding in *Cort v. Ash*, 422 U.S. 66 (1975). While particular reference will be made hereafter to the particular tests to be employed as announced by this Court in *Cort*, the right of Federal Courts to fashion private civil remedies has long been recognized.

In the holding of *Case Company v. Borak*, 377 U.S. 426

(1964), this Court found a private right of action under the Securities and Exchange Act, since the purpose of said Act was for the protection of investors. Consequently, an investor who was damaged as a result of a violation of said Act could base a right of recovery thereon. For other cases wherein this Court has recognized the power of Federal Courts to respond to announced federal policies and fashion a remedy consistent with a particular statutory enactment, the Court is referred to *Mitchell v. Robert DeMario Jewelery, Inc.*, 361 U.S. 288 (1960); *Schine Chain Theatres, Inc. v. United States*, 334 U.S. 110 (1948); *Porter v. Warner Holding Company*, 328 U.S. 395 (1946); *Bell v. Hood*, 327 U.S. 678 (1946); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944); *Sola Electric Company v. Jefferson Electric Company*, 317 U.S. 173 (1942); *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940); and *Deitrick v. Greaney*, 309 U.S. 190 (1940). Consequently, it is well established that the Federal Courts have the inherent power to fashion and create a civil remedy which would implement the legislative scheme of a particular statutory enactment.

Recognizing the disparity in tests being employed by the various Federal appellate tribunals, this Court in *Cort v. Ash*, *supra*, reviewed, coalesced, and again recognized the principal of implied federal remedies where such are necessary to effectuate the purpose of the legislation in question. In *Cort*, this Court further enumerated four tests to be employed in the determination of whether a federal civil remedy should be implied where none is specifically stated in the particular enactment. Said tests are as follows: (1) Is the plaintiff in a class for whose especial benefit the statute

was created? (2) Is there an explicit or implicit legislative intent to create or deny such a remedy? (3) Is the implication of a civil remedy to the plaintiff consistent with the underlying purpose of said legislation? (4) Is the cause of action one traditionally relegated to State law in an area basically of concern to the States, so as to make it inappropriate to infer a remedy on Federal law?

A careful review of the Aviation Acts and their legislative history amply substantiates the conclusion that a Federal civil remedy would be compatible with the criteria enunciated in *Cort*. In fact, such a conclusion has already been reached by a number of Federal Courts prior to this Court's holding in *Cort v. Ash*. For other aviation cases where federal remedies were recognized and acknowledged, *See, e.g., Fitzgerald v. Pan American World Airways*, 229 F.2d 499 (2nd Cir. 1956); *S. S. W., Inc. v. Air Transport Association of America*, 191 F.2d 658 (D.C. Cir. 1951), *cert. denied*, 343 U.S. 955 (1952); *Mortimer v. Delta Air Lines*, 302 F.Supp. 276 (N.D. Ill. 1969); *Town of East Haven v. Eastern Air Lines, Inc.*, 282 F.Supp. 507 (D. Conn. 1968); *Flores v. Pan American World Airways*, 259 F.Supp. 402 (D. Puerto Rico 1966); and *Wills v. Trans World Airlines*, 200 F.Supp. 360 (S.D. Calif. 1961).

While the aforesaid citations relate to aviation cases where Federal Courts have implied a civil remedy, none of said opinions applied the criteria of *Cort v. Ash, supra*. However, the Court in *Rausch v. United Instruments, Inc.*, 405 F.Supp. 435 (E.D. Pa.), *on rehearing*, 405 F.Supp. 442 (1975), construed and applied each of the four tests announced in *Cort* and concluded that a federal civil remedy was appropriate. With regard to

the first test above, the Court in *Rausch* held that there was clearly an overriding legislative purpose to promote safety in aviation for those who own and/or fly in aircraft. Further, since death and/or injury is the result sought to be prevented, then suits for such damage are clearly proper. With regard to the second test, no legislative intent exists or can be found to deny private civil remedies under said Act. In fact, numerous cases, as cited previously, recognize the legislative intent to provide such remedies under the various aviation statutes of this country. Third, a private right of action will encourage compliance with the Act, and is, therefore, consistent with the underlying purpose to promote air safety. In other words, inasmuch as civil liability will obviously induce compliance, an immunity from liability will have the converse effect, and, thus, the obvious intent of Congress will be best effectuated by the recognition of a federal civil remedy. Lastly, aviation and air commerce are not and have never been areas basically of concern to the States, and have traditionally been regulated almost exclusively by the Federal Government. Consequently, the Court in *Rausch* recognized a private civil remedy under the particular Act here involved.

Accordingly, DeKalb County, Georgia, can not rely upon the doctrine of governmental immunity when it enters the Federal Sphere governing and controlling interstate commerce through aviation. In addition, there should be recognized an implied federal civil remedy available to those for whose benefit the Aviation Acts of this country were created, namely, the aeronautical users and participants in interstate air commerce. Petitioner herein is a person intended to be benefited by

the Federal Aviation Statutes, and to deprive her of a remedy would impose an insuperable burden upon interstate commerce, and a substantial departure from the clear holding of this Court and other federal tribunals that have had occasion to consider the same.

PART II

2. IS THE CONTINUED RECOGNITION OF THE DOCTRINE OF SOVEREIGN IMMUNITY AS A DEFENSE TO COUNTY LIABILITY UPON THE FACTS OF THE PRESENT LITIGATION AN ARBITRARY AND IRRATIONAL DISTINCTION IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION?

Respondent DeKalb County, Georgia, operates the subject airport pursuant to a statutory scheme known as the Uniform Airport Act, and codified in Georgia law as Georgia Code Annotated §11-201, et seq. In said statutory framework, both counties and cities are eligible on an equal basis for federal aid under the various Federal Aviation Acts providing such monetary assistance. Nevertheless, despite the statute's intent to be applied uniformly throughout the United States, and the desirability of having interstate air commerce be subject to substantially similar statutory provisions throughout this country, the State of Georgia has continued to recognize the common law concept of sovereign immunity. In this portion of Petitioner's brief, attention is to be directed to the continued viability of said doctrine, at least insofar as it purports to apply to interstate air commerce, as well as the propriety of the District Court's ruling that the Uniform Airports Act of the State of Georgia was not an

implied waiver of sovereign immunity compatible with the provisions of Georgia Code Annotated §23-1502, barring county liability unless made so by statute.

It has long been recognized that the concept of sovereign immunity is of judicial origin rather than a legislative enactment. While some States have codified the concept, many Courts are acknowledging that what the judiciary has given, they may likewise take away. In this regard, the Courts of numerous States have recognized that the judiciary and not the legislature is the proper forum to strike the outmoded concept of sovereign immunity. It should be noted that the States of Alaska, Arizona, California, Colorado, Hawaii, Idaho, Illinois, Indiana, Iowa, Louisiana, Nebraska, Nevada, New Jersey, New York, Oregon, Rhode Island, Utah, Vermont, Washington, Wisconsin, District of Columbia, Kansas, Pennsylvania, and West Virginia have abolished sovereign immunity in their States. Of the twenty-four States just listed, eleven had sovereign immunity overturned by judicial decree rather than by and through the legislature. In addition, the States of Connecticut, Kentucky, Michigan, Minnesota, Tennessee, North Carolina, South Carolina, Texas, and Arkansas, have partially abolished the concept of sovereign immunity as to certain aspects and areas to which it previously was applicable. Other States, such as Georgia, have abolished sovereign immunity in certain areas where insurance was authorized, acquired and applicable to the particular cause of action.

For a review of the philosophies and policy reasons given for the abolition of sovereign immunity, wholly or in part, the Court is referred to the holdings in *Hicks v.*

New Mexico, 544 P.2d 1153 (N. Mex. 1976); *Parish v. Pitts*, 429 S.W. 2d 45 (Ark. 1968); *Spanel v. Mounds View School District Number 621*, 118 N.W. 2d 795 (Minn. 1962); *Colorado Racing Commission v. Brush Racing Association*, 316 P.2d 582 (Colo. 1957); *Hargrove v. Town of Cocoa Beach*, 96 S.2d 130 (Fla. 1957); *Muskopf v. Corning Hospital District*, 359 P.2d 457 (Calif. 1961); *Pierce v. Yakima Valley Memorial Hospital Association*, 260 P.2d 765 (Wash. 1953); *McAndrew v. Mularchuk*, 162 Atl. 2d 820 (N.J. 1960); *Molitor v. Kaneland Community District*, 163 N.E. 2d 89 (Ill. 1959); *Williams v. City of Detroit*, 111 N.W. 2d 1 (Mich. 1961); *Holytz v. City of Milwaukee*, 115 N.W. 2d 618 (Wis. 1962); and *Campbell v. State of Indiana*, 284 N.E. 2d 733 (Ind. 1972). All of said holdings hold and state that the defense of sovereign immunity can no longer be justified upon the basis that the "King can do no wrong." A review of the English Common Law establishes that the concept of sovereign immunity had an origin which was accidental, that its sole advantage is expediency, and that a continuation of said concept has progressed through inertia. There, thus, exists no rational basis for its continuance, and a majority of the States of this country have so recognized.

It has long been recognized that citizens retain the right not to be subject to discrimination because of their location. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Lucas v. Forty-Fourth General Assembly of State of Ohio*, 377 U.S. 713 (1964); *Roman v. Sincock*, 377 U.S. 695 (1964). Likewise, the Fourteenth Amendment to the United States Constitution, and in particular the Equal Protection Clause thereof, requires that any statutory classification of a State be neither arbitrary nor sub-

ject to invidious discrimination. *Loving v. Commonwealth of Virginia*, 388 U.S. 1 (1967).

As applied to a particular factual situation, this Court in *Levy v. Louisiana*, 391 U.S. 68 (1968); and *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164 (1972), found an irrational and invidious discrimination resulting from the classification of illegitimate children, and struck down as unconstitutional any application of Louisiana law which denied illegitimate children the rights and benefits to which they were entitled. As held by this Court, there, thus, must exist as to any legislative classification by a State a reasonable and rational difference between categories of citizens, and such classification must have a fair and substantial relation to the object to be achieved by such legislation. *Royster Guano v. Virginia*, 253 U.S. 412 (1920); *Morey v. Doud*, 354 U.S. 457 (1958); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Reed v. Reed*, 404 U.S. 71 (1971); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Therefore, while every classification by a State is not a violation of equal protection, those that are arbitrary will be so held, as will those founded upon an irrational basis. *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Griffin v. State of Illinois*, 351 U.S. 12 (1956); *McLaughlin v. State of Florida*, 379 U.S. 184 (1964); *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Atlanta Bowling Center, Inc. v. Allen*, 389 F.2d 713 (5th Cir. 1968).

What then remains is to apply the aforesaid principles to the facts of the present litigation. In summary, as has been recognized by a majority of the States of this country, there exists no rational basis for the continuing recognition of sovereign immunity. Under the cited decisions of this Court, statutory classifications which are arbitrary in nature and founded upon an irrational

basis, constitute a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Even more violative should be those classifications merely founded upon judicial edict and without statutory recognition, such as the concept of sovereign immunity. Inasmuch as DeKalb County, Georgia, relies upon the irrational defense of sovereign immunity as its sole bar to liability, this Court should hold said defense to be violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The constitutional infirmity in the classification scheme is further exemplified by the fact that under the law of the State of Georgia, had the occurrence here involved taken place at Atlanta's major air carrier airport, namely Atlanta Hartsfield Airport, then Petitioner would have had full right of recovery as against the City of Atlanta, whereas she is now denied of any form of recovery from DeKalb County, Georgia. Such distinction in treatment has long been condemned by this Court, as is shown by the holding in *Tinsley v. Anderson*, 171 U.S. 101 (1898). In *Tinsley*, this Court recognized that no equal protection violation would exist where the same course of procedure applied to the person in question would have been applied to any other person under the same circumstances. The present situation is exactly the converse of that position, i.e., Petitioner has substantially different rights merely because her deceased husband crashed after departing from an airport but ten miles away from that owned by the City of Atlanta. Such a result is not only unjust and inequitable, but patently violative of the constitutional protections to which she is entitled.

Petitioner also contends that the Courts below have

improperly construed the applicability and operation of the Uniform Airports Act of the State of Georgia, Georgia Code Annotated §11-201, et seq. Said statutory scheme was intended to promote a uniform and consistent interpretation of various State-enacted aviation statutes. As was stated by the Court in *Caroway v. City of Atlanta*, 85 Ga. App. 792 (1952),

> "And where substantially such laws have been so adopted, it is our thought that the Courts of the various States should seek a harmonious interpretation of the provisions." *Id.* at 796.

The Court further held that such statutes were intended to provide a framework wherein local governmental agencies could engage in the construction, operation, and maintenance of airport facilities. The Court in *Caroway* then proceeded to cite and quote with approval from the decisions of the Courts in Nevada and North Carolina. *Granite Oil Securities, Inc. v. Douglas County*, 219 P.2d 191 (Nev. 1950); *Rhodes v. City of Asheville*, 230 N.C. 135 (N.C. 1942). By reference to the *Granite Oil* case, the Nevada Supreme Court held as follows:

> "It is well settled law, frankly conceded by the respondent county, that when a municipal corporation acts in its private, corporate, or proprietary capacity, it may be sued for torts. . . . Respondents stand squa ely on the contention 'that a country, being a political subdivision of the State, cannot be sued in tort, regardless of the nature of the function, without legislative authorization.' . . . Perhaps even more convincing than some of the reasoning of the North Carolina court are the provisions of the 1947 act authorizing agreements between two or more cities and counties defining the proportionate interest of each in the property,

> facilities, and privileges, the duties and liabilities of each in the operation. . . . It is difficult to conceive of language which more aptly and more effectively places the county in precisely the same position as the municipality in the operation of such joint enterprise of maintaining and operating an airport. The entire structure of such a joint enterprise would fail if as a matter of law the municipality would be liable for its torts while the county would not." *Id.*

The Georgia Uniform Airports Law is substantially identical to that considered by the Court in *Granite Oil*, as is Georgia's acknowledgment of county immunity whereas such immunity would not exist and be applicable to municipalities.

Both the Georgia Court of Appeals in *Caroway v. City of Atlanta*, *supra*, and the Nevada Supreme Court in *Granite Oil Securities, Inc. v. Douglas County*, *supra*, have cited with approval and relied upon the North Carolina holding in *Rhodes v. City of Asheville*, *supra*, wherein the plaintiff brought an action against said city, the county, and others, for wrongful death of his intestate who was killed through the negligence of an employee at the airport. After discussing the same issues as are raised by respondent in the case at bar, the North Carolina Court concluded that,

> ". . . when it [the county] undertakes, with legislative sanction, to perform an activity which is proprietary or corporate in character, such a county may be liable in tort to the same extent as a city or town would be if engaged in the same activity." *Id.*

The aforesaid decisions have been cited with approval by several Georgia Courts, and, thus, are in conformity with the laws of this State. Accordingly,

the legislature has granted to the counties of this State authority to cooperate and join with municipalities in the construction, operation, and maintenance of airports, and has by implication granted to private individuals a right of action against either governmental entity under said uniform statutory network.

Consequently, the Courts below have failed to recognize the implied waiver of sovereign immunity which is a necessary adjunct to the adoption of the Uniform Airports Law. Only by utilizing such a construction so as to permit liability on an equal basis would said statutes have a rational basis so as to avoid the aforementioned charge of unconstitutionality. Therefore, the holding presently under review not only constitutes an erroneous interpretation of Georgia law, but also seeks to impart an unconstitutional application of such statutes under the Fourteenth Amendment to the United States Constitution. As such, this Court should reverse and remand with directions to acknowledge the responsibility of DeKalb County on an equal basis with other operators of airports throughout the United States.

PART III

3. DOES PETITIONER HAVE STANDING TO SUE DEKALB COUNTY, GEORGIA, AS A BENEFICIARY OF THE NUMEROUS GRANT AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND DEKALB COUNTY, GEORGIA?

Petitioner also contends that the Courts below erred in failing to recognize Petitioner's right of recovery as a beneficiary of the contracts entered into between the United States and DeKalb County, Georgia. With

regard to said issue, Petitioner contends, and has demonstrated by an attachment to her Complaint (A.26), that DeKalb County, Georgia, has executed, since 1960, six Federal Grant Agreements with the United States of America. In said Agreements, DeKalb County obligated itself to perform certain duties with regard to the operation of said airport, as well as the land lying in the immediate vicinity thereof. The Court is referred to the Statement of the Case of Petitioner herein for a few excerpts taken from said Contract, which are denominated as "Sponsor's Assurances." For a more complete examination of said Assurances, the Court is referred to pages 26 through 39 of the Joint Appendix filed in this action. Without repeating what has heretofore been said, or which may be found by a closer review of the specific wording of said Assurances, DeKalb County *inter alia* obligated itself to operate DeKalb-Peachtree Airport for the "use and benefit of the public"; prohibit any "activity thereon which would interfere with its use for airport purposes"; not make or permit the making of "any changes or alterations in the Airport or any of its facilities other than in conformity with the airport layout plan as so approved by the FAA"; and within its power and to the extent reasonable, "take action to restrict the use of land adjacent to or in the immediate vicinity of the Airport to activities and purposes compatible with normal airport operations *including landing and take-off of aircraft.*" (Emphasis added.)

It is undisputed that each and every Assurance hereinabove stated and just quoted was violated by DeKalb County, Georgia (as this Court must assume in ruling upon a motion to dismiss for failure to state a claim upon which relief can be granted). Nevertheless,

DeKalb County received in excess of $1,025,224.06 in exchange for these "Sponsor's Assurances." More particularly, it is contended and shown that DeKalb County, Georgia, violated said Agreement and permitted a garbage dump to be maintained upon and adjacent to DeKalb-Peachtree Airport. These actions constituted a willful violation of the subject Grant Agreements established and Assurances given by respondent. As a result of said breach, birds were permitted to congregate alongside of and upon DeKalb-Peachtree Airport, which condition was wholly incompatible with defendant's obligation to maintain safe airport-operations, and which were further an extreme hazard to the normal landing and taking off of aircraft from said airport.

It is undisputed that the law of the State of Georgia permits a county to be sued upon any contract which it is authorized to make. *Deason v. DeKalb County*, 222 Ga. 63 (1966); *Washington County v. Sheppard*, 46 Ga. App. 240 (1933). There then remains the question as to whether DeKalb County may be sued in contract by a third-party beneficiary of said contract, and, if so, whether a defense of sovereign immunity is applicable with regard thereto.

As to third-party beneficiary status, and Petitioner's right and entitlement to proceed with regard thereto, eight judges of the en banc panel concluded that Federal law would be applicable, and that as such, Petitioner was not entitled to recover. The majority of the original panel, and five members of the en banc panel in the Court below, concluded that Georgia law was applicable and should be utilized to determine Petitioner's rights. It is Petitioner's position that irrespective of

which interpretation is utilized, she is clearly an intended third-party beneficiary for whose benefit the Assurances were given, and that upon the breach of such Assurances by a party to said contract, a right of action should and does exist.

Under Georgia law, and pursuant to Georgia Code Annotated §3-108, it is clear that a beneficiary of a contract made between other parties, may maintain an action against the promisor on said contract despite the fact that he furnished no consideration for the promise. *Sheppard v. Bridges*, 137 Ga. 615 (1911). In the case at bar, there is no dispute as to the right of Respondent to contract with the United States for the construction and maintenance of airport properties and runways, and thus any contract entered into between Respondent and the United States was with full statutory authorization. *See*, Georgia Code Annotated §11-201. Applying the concept of third-party beneficiary status to the question of Petitioner's right to recover for personal injuries and wrongful death, the Court is referred to the two holdings of the Georgia Supreme Court arising out of the death of Fannie Laura Williams on or about August 24, 1971. Said action first came to the Georgia Supreme Court in *Hancock County v. Williams*, 230 Ga. 723 (1973), upon the trial court's *refusal* to dismiss Hancock County pursuant to Georgia Code Annotated §23-1502, relating to governmental immunity. The Georgia Supreme Court affirmed the holding of the trial court, and in pertinent part, stated as follows:

> "The complaint as amended, showed a contract of easement between Hancock County and Georgia Power Company covering the area where the plaintiff's mother was killed, and in which contract

> the county agreed to indemnify Georgia Power Company for any damages arising out of the use of such easement by the county.
>
> "The Act of 1946 (Ga. L. 1946, p. 152; Code Ann. Ch. 69-6), authorizes counties to enter into contracts so as to provide recreational facilities within a county. Thus, the contract was authorized. Being an authorized contract, the action would lie thereon. Compare, *Decatur County v. Praytor & C. Contr. Co.*, 163 Ga. 929, 933 (137 SE 247).
>
> "The complaint as finally amended set forth a cause of action against Hancock County based upon the contract which was valid, and for this reason, and without the necessity of consideration being given to the constitutionality of Code §23-1502, the judgment of the trial court overruling the motions of Hancock County to dismiss the complaint and cross complaint were properly overruled." *Id.* at 724-25.

The Georgia Supreme Court found it unnecessary to consider the constitutionality and applicability of the governmental immunity statute, since the contract was authorized under another statute providing therefor. Stated somewhat differently, a county may properly be sued for damages arising out of wrongful death where there exists a valid contract executed pursuant to statutory authority. This holding was reaffirmed by the Georgia Supreme Court in a later appeal of the same case, to wit, *Williams v. Georgia Power Company*, 233 Ga. 517 (1975), when the Court held as follows:

> "The appellants also contend that the trial court erred in giving the requested charges which limited the county's liability to that arising under the county's indemnity agreement with the Georgia Power Company.
>
> "There is no merit in this contention.

> "Since Code §23-1502 states that a county is not liable to suit for any cause of action unless made so by statute, the Court correctly charged the jury that the only liability of the county was under its indemnity contract with the power company." *Id.* at 518-19.

Consequently, the Court has reaffirmed its holding that Hancock County, Georgia, would be liable for wrongful death upon its contract entered into with the Georgia Power Company.

As further support for the proposition that under Georgia law members of the public are intended beneficiaries under contracts executed by a governmental agency and a private contractor despite the fact that no specific reference is made to the particular members of the public to be protected, and in the absence of any specific contractual provision stating the measures of damages to be afforded the injured beneficiaries of that contract, the oft-cited decision in *Smith v. Ledbetter Brothers, Inc.*, 111 Ga. App. 238 (1965), is of particular importance. In a contract executed between the State Highway Department of Georgia and Ledbetter Brothers, Inc., the latter party agreed to "provide all safeguards, safety devices, and protective equipment, and to take any other needed actions, on his own responsibility, or as the contracting officer may determine, reasonably necessary to protect . . . the safety of the *public*. . . ." (Emphasis added.) Certain acts of negligence were alleged to exist in the failure of the contractor to perform his obligations under the agreement, resulting in substantial injuries to the occupants of a motor vehicle. In speaking to the question of whether the injured passengers were contemplated beneficiaries, and whether

they had standing to sue upon said contract, the Court held as follows:

> "A contract between the State Highway Department and a construction company by which the latter undertakes to provide for the safety of the public during the construction of the project inures to the benefit of the public, and a member of the public injured as a result of negligence in failing to do so may sue the contracting party directly." *Id.* at 240.

Consequently, under Georgia law, members of the public can, in the proper case, be within the contemplation of the parties as intended beneficiaries. *See, Holland v. Phillips*, 94 Ga. App. 361 (1956); *M. R. Thomason & Associates, Inc. v. Wilson*, 125 Ga. App. 658 (1972); *State Construction Company v. Johnson*, 88 Ga. App. 651 (1953).

It thus appears under Georgia law that counties may be sued upon those contracts which it is authorized to make, *Southern Airways Company v. DeKalb County*, 102 Ga. App. 850, *cert. denied*, 118 S.E.2d 234 (1960) (involving the very same airport and the very same county as the present litigation), and that a county in this State may be found liable and responsible for wrongful death damages by a third-party beneficiary of such contract, *Hancock County v. Williams, supra*. The Court will note that no decision as to sovereign immunity is required in order to apply the Georgia interpretation of third-party beneficiary liability.

Nevertheless, a majority of the en banc panel determined that the principle announced in *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938), would be inapplicable to the construction of contracts such as here involved. Stated somewhat differently, the en banc

panel concluded that federal common law interpretation should be applied to the determination of Petitioner's right as a third-party beneficiary, and after having so concluded, held that Petitioner's interests failed to comport with federal standards, and thus was not entitled to relief. However, the Court below failed to mention, distinguish, or even discuss those cited Federal Court decisions which specifically reached opposite conclusions. In particular, the Court in *Luedtke v. County of Milwaukee*, 521 F.2d 387 (7th Cir. 1975), concluded that private, noncontracting parties, may qualify as intended beneficiaries under the particular Act and type of FAA Grant Agreements involved in the present litigation. Likewise, the Court in *Town of New Windsor v. Ronan*, 321 F.Supp. 1286 (S.D. N.Y.), *affirmed*, 481 F.2d 450 (2nd Cir. 1973), concluded that after exhaustion of administrative remedies, judicial review is permitted as to the compliance of a party with Assurances made by that party to the Federal Government in a quit-claim deed of airport property.

Most significant of all decisions is the holding in *City of Inglewood v. City of Los Angeles*, 451 F.2d 948 (9th Cir. 1971), wherein the Court of Appeals recognized and applied to substantially identical Grant Agreements as that here involved the tests stated by this Court in *Barlow v. Collins*, 397 U.S. 159 (1970), to wit, (1) Do the plaintiffs have a personal stake and interest that impart the concrete adverseness required by Article III of the United States Constitution? (2) Are plaintiffs within the zone of interests to be protected or regulated by the statutory enactment? (3) Is judicial review precluded by said statutory scheme? It was undisputed by the Court in *City of Inglewood* that those

aircraft taking off and landing from said airport clearly were within the purview of those persons to be protected by the Federal Airport and Airway Development Act of 1970, 49 U.S.C. §1711, et seq. The question presented to the Circuit Court was whether the citizens of the City of Inglewood had standing to sue the City of Los Angeles as a third-party beneficiary under a contract executed and entered into between the City of Los Angeles and the United States Government. Speaking to this issue, the Court concluded,

> "If Los Angeles made the assurances required by sec. 1716(c)(3) and sec. 1718(4) [49 U.S.C. §§1716(c)(3) and 1718(4)] in applying for various grant agreements, then Inglewood must certainly be included within the category of intended beneficiaries of those assurances. Congress had some purpose in enacting these two sections of Title 49. It is not to Los Angeles' benefit to be required to give the Secretary those assurances; nor are the assurances of any independent benefit to the Secretary. The Secretary merely receives them for the benefit of, and in the place of, the surrounding communities and residents in the area. Any other interpretation of sec. 1716(c)(3) and sec. 1718(4) deprives them of any meaning or effect." *Id.* at 956.

Consequently, the Ninth Circuit has concluded that citizens of surrounding communities have a right of action against a contracting party to a Federal Grant Agreement as to the question of noise pollution. If that decision is to have any persuasive effect, then clearly, passengers aboard an aircraft taking off from the subject airport would certainly fall within the purview of those intended to be protected. The applicability of said holding to the present litigation is apparent.

Even more analagous to the case at bar, if that were possible, is the holding of the Court in *Rapp v. Eastern Air Lines, Inc.*, 264 F.Supp. 673 (E.D. Pa. 1967), wherein the Court, in what is now considered the landmark bird ingestion case, arising out of a crash of an Eastern Air Lines Electra into Boston Harbor after ingesting birds into the engines thereof, concluded that, (a) airport users are in fact and in law third-party beneficiaries of the particular type Grant Agreements involved in the present litigation, (b) airport users are entitled to sue the offending party for breach of the covenants contained in such Grant Agreements, and (c) that a third party may claim for relief for wrongful death based upon breach of the type of Grant Agreements as are before the Court in the present litigation. Accordingly, the Court in *Rapp* concluded that the Sponsor's Assurances had been breached, and imposed liability thereon.

Therefore, under the aforesaid holdings, if federal law is applied to the construction of contracts executed pursuant to various Federal Aviation Statutes, then liability would properly repose with DeKalb County, Georgia.

With regard to other Federal holdings that have had occasion to consider third-party beneficiary status, the Court below in *Bossier Parrish School Board v. Lemon*, 370 F.2d 847 (5th Cir. 1957), considered a contract involving financial aid from the United States Department of Health, Education and Welfare to Bossier Parish School System. In return, the school board assured the United States that it would admit children of military personnel at the Army base on the same terms as were available to other children in such school

district. Actually, the board required the children to attend segregated schools. The parents of the Negro children affected brought a class action suit to allow their children to attend integrated schools. One of the questions raised was whether the children had standing to sue. In answer to this question, the Court below stated,

> "Defendants by their contractual assurances have afforded rights to these Federal children as third-party beneficiaries concerning the availability of public schools." *Id.* at 850.

Consequently, without even passing reference being made to its earlier holding, the Court below concluded that Federal law did not permit Petitioner to sue for the losses she has sustained. Likewise, the Court below in *Seaboard Air Line Railroad v. County of Crisp of State of Georgia*, 280 F.2d 873 (5th Cir. 1960), *cert. denied*, 375 U.S. 942 (1961), concluded that a county could be responsible under a duty imposed by the Federal Power Act for breach of its assurances with regard thereto.

In brief, it is Petitioner's contention that those cases heard and determined by this Court which are most closely analagous to the present factual situation do not impose a federal common law rule for the determination of third-party beneficiary status. *See, Bank of America v. Parnell*, 352 U.S. 29 (1956); *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966). Further, even if federal common law were determined to be applicable to the interpretation of the subject Grant Agreements, then Petitioner has consistently been recognized to fall within the category of persons for whose especial benefit the Assurances were required.

Lastly, in the event Georgia law is applicable, the law of this State permits, recognizes, and allows a third-party beneficiary to sue a county upon a contract which it is authorized to make for damages arising out of wrongful death. The cases cited by the en banc court are factually distinguishable from the present litigation or do not support the position therein advanced, while those cases which have had occasion to construe and interpret the particular Federal Airport and Airway Development Act of 1970, as well as Grant Agreements and contracts issued pursuant thereto, uniformly establish the right of neighboring communities and persons injured and affected thereby to maintain an action for the losses sustained.

Accordingly, Petitioner requests that the opinion of the Court below be reversed, as without legal bases.

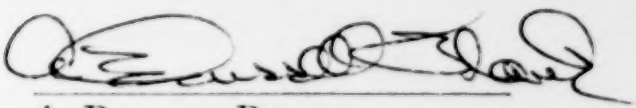
CONCLUSION

For the above and foregoing reasons, Petitioner contends that the Court Below erred in finding that Petitioner failed to state a claim upon which relief can be granted. The holding of the Court below is in contravention of the majority of Federal and State statutes which have had occasion to consider and construe the applicability of the Federal Aviation Statutes and the particular contracts and Grant Agreements of the type here involved. The continued enforcement and recognition of sovereign immunity, at least as to county action in the area of Federal Aviation, imposes a burden upon interstate commerce, results in a deprivation of Petitioner's equal protection rights, and a denial of contractual accountability which should be imposed upon Respondent herein. Accordingly, Peti-

tioner herein respectfully prays that this Court will reverse the holding of the United States Court of Appeals for the Fifth Circuit and remand this action for further proceedings under the Federal Aviation Statutes and the Grant Agreements herein involved.

Respectfully submitted,

ROSS & FINCH



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CERTIFICATE OF SERVICE

I hereby certify that I have made service of the foregoing Brief by depositing a copy of same in the United States Mail with sufficient postage affixed thereto, addressed to each of the following:

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